

REPORT TO THE
TWENTY-FIFTH LEGISLATURE
STATE OF HAWAI'I
2009

PURSUANT TO ACT 40, SESSION LAWS OF HAWAII, 2007
REQUIRING THE STATE COUNCIL ON DEVELOPMENTAL
DISABILITIES TO SUBMIT A FINAL REPORT ON THE NUMBER
OF INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES OR
MENTAL RETARDATION WHO CHOOSE TO LIVE
INDEPENDENTLY, THE FINANCIAL IMPACT ON THE STATE,
AND THE FINDINGS, RECOMMENDATIONS, AND THE
FINANCIAL IMPACT OF ACT 303,
SESSION LAWS OF HAWAII, 2006.

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STATE OF HAWAI'I
DEPARTMENT OF HEALTH
STATE COUNCIL ON DEVELOPMENTAL DISABILITIES
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I. INTRODUCTION

This report is the final report pursuant to Section 2 of Act 040, Session Laws of Hawaii (SLH) 2007 entitled, “A Bill For An Act Relating To Developmental Disabilities.” Act 040 extended the repeal of Act 303, SLH 2006, from June 30, 2008 to June 30, 2009, and required the State Council on Developmental Disabilities (DD) to submit a progress report no later than 20 days prior to the convening of the regular session of 2008, and a final report no later than 20 days prior to the convening of the regular session of 2009.

The Twenty-Third Legislature passed House Bill 2098, House Draft 1, Senate Draft 1, Conference Draft 1, entitled “A Bill for an Act Relating to Developmental Disabilities.” It became law without the Governor’s signature as Act 303, pursuant to Section 16 of Article III of the State Constitution.

Act 303/2006 required the provision of community residential alternatives for persons with DD or mental retardation (MR) to be in a setting of the person’s choice if the person with the help of family and friends, if necessary, determines that the person can be sustained with supports, the supports are attached to the person, and adequate consideration and recognition is given to the person’s safety and well-being. Act 303 also required DD Council to submit a preliminary report to the Legislature no later than 20 days prior to the convening of the regular session of 2007, and a final report no later than 20 days prior to the convening of the regular session of 2008. Act 040 amended the reporting requirements to have DD Council submit a progress report to the 2008 Legislature and a final report to the 2009 Legislature.

The preliminary and progress reports included:

- A. Implementation of Act 303.
- B. The number of persons with DD or MR who choose to live independently as provided by Act 303.
- C. The financial impact this Act has had on the State.
- D. Findings and recommendations.

The Act 303 Workgroup consisted of a parent of a son with DD receiving services from DD Division; a service provider; representatives from Department of Health (DOH), DD Division, Case Management & Information Services Branch (CMISB) and DD Services Branch (DDSB), and Office of Health Care Assurance (OHCA); Department of the Attorney General (AG); DD Council; and Hawaii Disability Rights Center. The Workgroup met during the interim to continue discussion on issues and concerns identified in the 2007 Preliminary and 2008 Progress Reports, implementation of Act 303, and addressing concerns conveyed by Governor Lingle in Governor’s Message (GM) 861 dated July 12, 2006, and GM 798 dated April 26, 2007.

Governor Lingle expressed the following concerns in her messages:

First, Act 303 does not state how the person's choice of residential setting is to be made and how DOH is to support the choice. Under the current system employed by the Developmental Disabilities Division (DDD) of the DOH, DDD assists clients to locate licensed or certified homes. This bill will create uncertainty over DOH's role in selection of these residential alternatives even though State money would be spent supporting the individual.

Second, Act 303 does not specify how to determine whether "adequate consideration and recognition" has been given to the person's safety and well-being. Act 303 does not mention licensing or certification requirements, an omission that could lead to an interpretation that this amendment to Section 333F-2(c) allows placement in unlicensed or uncertified homes. Allowing placement in unlicensed or uncertified homes poses a risk for the safety and well-being of persons with DD or MR because it is only through licensing or certification requirements that safety standards, such as criminal history background checks of the home operator and periodic monitoring or unannounced home visits, are maintained. Any program that purports to assist the developmentally disabled under the care of the State must include a degree of accountability within the system.

The Preliminary Report (December 2006) submitted to the Twenty-Fourth Legislature, Regular Session of 2007, included the number of persons who choose to live independently by Act 303, and the financial impact of the Act. The Workgroup identified issues and dilemmas in the areas of:

- A. Health and safety.
- B. The Code of Federal regulations for Centers for Medicare and Medicaid Services (CMS).
- C. Licensing and certification by OHCA and DDD.
- D. Challenges in finding placements for persons with DD/MR
- E. Guidelines and procedures for assessment, managed/negotiated risk agreement.
- F. Adverse event reporting; and licensing and certification by OHCA, and DD Division.

The following items were identified by the Workgroup as needing further discussion and consideration during the interim of the 2007 legislative session:

- A. Clarification of settings (in a setting that the person identifies).
- B. Specific criteria to address health and safety.

- C. State immunity from liability.
- D. Establishment of a common workable definition of what is adequate consideration and recognition given to the person's safety and well-being.
- E. A certification process that includes criminal history background of potential caregivers.
- F. A risk assessment of individuals to match compatibility with caregivers.
- G. An "expanded care" option to the current DD domiciliary homes that would open up more placement options to higher level of care clients. This would be modeled after the expanded adult residential care homes (ARCH) that allows for an individual requiring professional health services provided in an intermediate or skilled nursing facility to remain in ARCH.
- H. Development of criteria (negotiable and non-negotiable requirements) for a "new" category of a residential option. Such an option should be distinct from the current residential options in terms of benefits to care providers to prevent the risk of an exodus of licensed/certified providers to the lesser level homes.

The Progress Report (December 2007) submitted to the Twenty-Fourth Legislature, Regular Session of 2008, included the above eight items for consideration and action; the implementation of a person-centered process; the number of persons who choose to live independently by Act 303; the number of persons with DD who live with parents, family members, grandparents, other relatives, siblings and spouse; and the financial impact of Act 303. Implementation of the person-centered process addresses Governor Lingle's concern about how the person's choice of residential setting is to be made and how DOH is to support the individual's choice. The person-centered process is used to develop an Individualized Service Plan (ISP). In order to provide the Workgroup with additional time to address those areas, Act 303 was amended to extend the repeal date from June 30, 2008 to June 30, 2009.

II. PURPOSE

The purpose of Act 040 was to extend the repeal date of Act 303, SLH 2006. Act 303 was scheduled to sunset on June 30, 2008. Act 040 extends the sunset date to June 30, 2009. It also requires DD Council to submit a progress report to the Legislature no later than 20 days prior to the convening of the Regular Session of 2008, and a final report to the Legislature no later than 20 days prior to the convening of the Regular Session of 2009. The reports are to include the following:

- A. The number of persons with DD/MR who choose to live independently as provided by Act 303;
- B. The financial impact this Act has had on the State; and
- C. Any findings and recommendations, including any proposed legislation.

III. NUMBER OF PERSONS WITH DEVELOPMENTAL DISABILITIES OR MENTAL RETARDATION WHO CHOOSE TO LIVE INDEPENDENTLY PROVIDED BY ACT 303/2006

The data below represents an unduplicated number of individuals living in various residential situations based on what was reported by staff of DD Division, CMISB.

TABLE 1
NUMBER OF PERSONS WITH DEVELOPMENTAL DISABILITIES OR MENTAL RETARDATION WHO CHOOSE TO LIVE INDEPENDENTLY PROVIDED BY ACT 303/2006

Living Arrangement	2006	2007	2008	Comments
1. Persons who want to live independently in their own home (with or without supports) but would require a rental subsidy to help pay for rent	27	18	14	Individuals are living with parents, relatives, or in a licensed setting & have indicated that they would like to live in their own apartment.
2. Persons living in a family owned home with a live-in caregiver who is paid.	7	7	9	
3. Persons living in a family owned home with supports, but there is no live-in paid caregiver.	No data recorded for this FY	5	11	
4. Persons living in a home that he/she rents from a landlord with no paid supports. In this situation, the landlord has no interest other than renting the home to the individual.	13	10	9	
5. Persons living in a home that he/she rents from the landlord and receives paid support from someone coming into the home.	8	6	14	Increase is due to individuals residing in Ohana units.
6. Persons living in the home of another and does not receive paid Medicaid waiver supports in the home.	18	17	14	
7. One or two individuals rent a single apartment unit from a landlord.	32	110	107	FY 06 didn't include Arc of HI apartments. FY 07 & 08 includes Arc of HI apartments & in any apartment.
8. A person living in the home of a caregiver (non-family) who is paid through the Medicaid waiver to provide services in the home and the home is not licensed/certified.	7	9	7	
9. Persons who are not satisfied with their current living arrangement.	12	14	11	
10. Persons currently living with own family	1,902	2,116	2,230	
Total	2,026	2,312	2,426	

Source: DDD, CMISB - Preliminary Report to the 2007 Legislature pursuant to Act 303, SLH 2006 and Progress Report to the 2008 Legislature pursuant to Section 2 of Act 040, SLH 2007.

In the reports submitted to the 2007 and 2008 Legislature, case managers from the DD Division, CMISB were asked to provide the numbers of individuals in the above residential setting situations in addition to the number of individuals with DD/MR who choose to live independently as provided by Act 303 (addressed in Item 1).

Based on the information above and in addressing this section, there are a total of 2,426 adults with DD/MR who are living in various residential settings. Of that number, 2,230 live with their family and 196 live in settings other than with family. There are 14 individuals who want to live independently in their own home (with or without supports), but would require a rental subsidy to help pay for rent. These individuals live with their family, relatives, in an ARCH or Adult Foster Home (AFH), or are homeless, but remain in their current living situation due to limited resources to assist them to live independently. These 14 individuals are directly impacted by the implementation of Act 303, as they desire to live in a residential setting other than what they currently reside in now.

The individual's ISP should identify their choice of residential setting and supports needed to transition from their current living situation to their desired residential option. Although the process may be in place to address the individual's choice of residential setting, there may be limited or no resources to support the individual in that particular residential setting. There are rental considerations regarding deposits and monthly rental payments. Limited resources in the areas of Section 8 vouchers, low cost rentals, and rental subsidies, and the high cost of living in Hawaii make it challenging for individuals with DD/MR to obtain housing to live independently.

IV. IMPLEMENTATION OF ACT 303/2006

As mentioned previously, DDD implemented a person-centered process to develop the ISP for an individual to receive services from DDD. This process in developing an ISP addresses the Governor's concern regarding how the person's choice of residential setting is to be made and how DOH is to support the individual's choice.

A new ISP format was piloted in 2007 that included a section, "Where I Want To Live" as a priority area to be discussed with the individual and his/her circle of supports. The ISP format includes:

- A. Circle of Support
- B. This is Who I Am
- C. What's Important and Meaningful to Me
- D. My Goals
- E. Action Plan
- F. Other Pertinent Information

Choice of residential setting, health and well-being, and safety issues are emphasized and addressed in Item (3), What's Important and Meaningful to Me. As appropriate, the individual's circle of support with the case manager will identify what is needed and necessary to support the individual to achieve his/her goal(s) in the area of where he/she wants to live, his/her health,

well-being, and safety. Specific concerns and supports will be noted in the ISP to address each area and identify the person and/or entity responsible to support the individual.

Implementation of the above ISP format began on July 1, 2008. Training on implementing the new format was conducted and completed for case manager and service providers. There were 12 training sessions conducted statewide between February through May 2008. The breakdown on those trainings included:

- (1) Hilo = 1
- (2) Kauai = 1
- (3) Kona = 1
- (4) Maui = 2
- (5) Molokai = 1
- (6) Oahu = 6

The majority of participants of the trainings were staff from CMISB and staff from provider agencies. Parents and representatives from Department of Human Services (DHS) also attended. Overall, about 305 people participated in the trainings.

V. OUTCOMES OF ACT 303

The Workgroup has been meeting since the passage of Act 303 to: (1) address the Governor's concerns, (2) identify and pursue other alternatives to increase residential options and choice for individuals with DD/MR, and (3) determine what current licensing and certification requirements can be amended or deleted. There have been thoughtful, meaningful and lively discussions on licensing and certification statutes and administrative rules, health and safety issues, determining what is adequate consideration and recognition to individual safety and well-being, and State immunity from liability. It has been challenging to come to agreement or some level of consensus on the above areas. An accomplishment or positive outcome of the Workgroup meetings and discussions is the cooperative and collaborative approach and willingness to work together beyond the scope and time frame of the Workgroup. There is a better understanding and respect of the role and responsibilities of the agencies and individuals represented on the Workgroup. Increased communication between the agencies has also evolved.

The Workgroup acknowledged the following additional outcomes:

A. Financial

The Workgroup found it difficult to determine the financial impact that Act 303 has had on the State. Those individuals who have indicated that they would like to live independently on their own have not yet been able to do so without additional financial assistance, such as a rental subsidy. Current Federal Supplemental Security Income (SSI) is \$637.00 per month for an eligible individual living in an independent arrangement or in the household of another. This rate will increase to \$674.00 per month effective January 1, 2009, as a result of an increase of 5.8 percent in Cost of Living Allowance. No State Supplemental Payment (SSP) is provided to

individuals in this type of living arrangements. SSP is available for eligible individuals residing in domiciliary care for one to five residents (Type I) and six or more residents (Type II), and community care foster family homes. See Table 2 for a breakdown of State and Federal payments for various living arrangements.

An individual with DD/MR who is Medicaid eligible would be able to receive services from the Home and Community Based Services (HCBS) Medicaid Waiver Program (Waiver) for persons with DD/MR. The waiver provides a variety of services such as adult day health; chore; emergency outreach, respite and shelter; environmental accessibility adaptations; personal assistance; personal emergency response system; residential habilitation, skilled nursing, specialized medical and equipment and supplies; supported employment, training and consultation; and transportation.

The average person cost (APC) for waiver services in FY 2008 was \$40,363. This amount does not include an individual's SSI and SSP for room and board. An individual living in a domiciliary living arrangement, such as an AFH, adult residential care home or DD domiciliary home, would be eligible to receive a combined total (SSI and SSP) of \$1,325.90 per month (\$15,910.80 per year) in benefits. That amount in addition to the waiver services benefit would total \$56,273.80.

Individuals who live independently would receive the Federal SSI and may be eligible to receive Waiver services to support them to live independently in the community. Based on the APC for FY 2008 of \$40,363 and Federal SSI of \$8,088, the total amount for supporting an individual to live independently would be \$48,451 per year. Supporting an individual in an independent setting (\$48,451) is less costly than supporting that person in a domiciliary living arrangement (\$56,273.80).

TABLE 2
STATE AND FEDERAL PAYMENTS FOR
VARIOUS LIVING ARRANGEMENTS

	State Supplement	Federal SSI	Total	Effective Date
Living Arrangement				
Domiciliary Care (1 to 5 residents)	\$651.90 \$651.90	\$637.00 \$674.00	\$1,288.90 \$1,325.90	11/01/2008 01/01/2009
Domiciliary Care (6 or more residents)	\$759.90 \$759.90	\$637.00 \$674.00	\$1,396.90 \$1,433.90	11/01/2008 01/01/2009
Community Care Foster Family Home	\$651.90 \$651.90	\$637.00 \$637.00	\$1,288.90 \$1,288.90	11/01/2008 01/01/2009
Independent	-0-	\$637.00 \$674.00	\$637.00 \$674.00	Present 01/01/2009
Household of another	-0-	\$449.00 \$449.00	\$449.00 \$449.00	Present 01/01/2009

Source: DHS, Letter to Social Security Administration, Center for Programs Support Regional Office, dated October 23, 2008.

B. New ISP Format

According to Section 333F-1, Hawaii Revised Statutes, an ISP “means the written plan required by section 333F-6 that is developed by the individual, with the input of family, friends, and other persons identified by the individual as being important to the planning process. The plan shall be a written description of what is important to the person, how any issue of health or safety shall be addressed, and what needs to happen to support the person in the person’s desired life.” The planning process is person-centered that focuses on the individual with DD/MR and is surrounded by his/her circle of supports. An ISP would be developed with the person and his/her circle of supports that identifies the person’s strengths, preferences, choices and desires in what kinds of services and supports are needed to live, work and play in the community.

As a result of Act 303, the ISP was amended to include a section that specifically addresses where the person wants to live, health and safety issues, employment, leisure and recreational activities, etc. This section identifies an action plan with goals and outcomes. Overall, the new format is user-friendly and comprehensive in capturing a total picture of the individual’s life and his/her preferences and desires on how and where that person wants to live and be part of the community. Training provided to case managers and service providers in the use of the new format should result in a consistent approach to implementing the ISP process.

C. Potable Water Policies

The use of catchment water has been a barrier for care providers to become certified as AFH providers. People living in rural areas, especially on the Neighbor Islands, use a catchment water system to collect water for various uses (drinking, laundry, vehicles, etc.). Certification requirements do not allow catchment water to be used for drinking.

DDD has drafted policies and procedures on potable water and the document is under review. Drinking source must be made available and/or there must be a plan for a drinking source. In order for a home to be certified, potable water must be available. Catchment water is not considered potable water, and if used in the home, a certification agreement may be required to assure that catchment water will not be used for drinking. A demonstration of safe drinking water, such as bottled, purified, etc., will be required to provide evidence that potable water is available in the home.

D. Quality of Life for Individuals with DD/MR and Their Families

The amendments made to the ISP format, development of potable water policies and procedures, and expedited process for certification of AFHs have contributed to the improved overall quality of life for individuals with DD/MR and their families. The ISP format focuses on the individual expressing and indicating his/her choice of where he/she wants to live, addresses health and safety issues, and identifies the supports needed to live in the community. The development of potable water policies and procedures will allow interested persons to become care providers and meet water policies, thus an increase in residential options. A review of the Hawaii Administrative Rules that allow for person-specific AFHs has resulted in a maximized

ability to implement expedited certification. Refer to B. Final Report (December 2008) for a description of the expedited residential option.

Anecdotal observation and informal feedback indicate that individuals' placements into their own home or apartment are happier, content and satisfied. Individuals with challenging behaviors have shown significant improvement in their behaviors, overall growth in social development and well-being, and increase participation in community activities.

VI. FINDINGS AND RECOMMENDATIONS

A. Progress Report (December 2007)

In the Progress Report (December 2007), the Workgroup considered the following initiatives based on the review of the revised ISP process, current Adult Foster Home (AFH) statutes, administrative rules, data of individuals with DD/MR in various residential settings and number of individuals living with parents, family members, grandparents, other relatives, siblings and spouses.

(1) New Category of Residential Option

An initiative was proposed to implement a new category of residential option using the current AFH administrative rules and the new ISP format implemented by DDD, CMISB. The intent was to increase residential options for individuals on the Neighbor Islands and at the same time address potable water policy issues in rural areas of the Neighbor Islands. This new category option would have begun as a pilot project in Kauai, Hawaii, and Maui Counties. The following is a summary of the proposed new category of residential option.

- Any adult with DD/MR (or their designated representative) known to DOH, DDD can request to live with a particular person or family. This may be predicated on a pre-existing relationship between the individual and the homeowner.
- The individual's case manager would submit a request to DD Division, DDSB, Certification Unit.
- Require a local criminal history check of all persons living in the home. Individual/guardian can waive a criminal history. The FBI and Child Welfare Services and Adult Protective Services checks would also be done, but not to deter the individual from initially moving into the home.
- Provide a functional assessment of the environment based on the individual's needs.
- Permit written attestation by the individual/guardian as a substitute for a home study.

- The home would be certified as an “Adult Family Home” for one specific individual with DD who has stated this is what he/she wants.
- Instead of stating the maximum number of foster adults, it will state the person’s name the home is certified for.
- If something should happen to the specified individual, there is no obligation to place another person in the home.
- The caregiver would receive SSI and SSP only for that one individual.
- Is targeted for persons who would require supports to live in the community. Waiver services could be provided in the home by persons not living in the same home.

STATUS: After discussion and review between DDD staff and the AG’s office, it was determined that there is no legal basis to deviate from the administrative rules that govern AFHs. It was not meant for the above to be in lieu of current certification requirements. However, for specific placement of an individual in an AFH, it was decided that certification process could at least be expedited. Refer to B. Final Report (December 2008) for a description of the expedited residential option.

(2) Use of Existing Resources

For persons with DD/MR, limited income creates a barrier to independent living and relegates them to live in situations in which others exert control over their daily lives. Often their primary source of income is Social Security. While the waiver program provides support services to prevent institutionalization and enable individuals to live in the community, it does not provide financial support for room and board. The amount of funding from SSI (\$637.00 per month) does not provide sufficient dollars to pay for rental deposit, monthly rent and utilities for individuals in Hawaii's competitive rental housing market.

The process of utilizing flexibility within existing resources to create opportunities for individuals to live independently is once an individual budget for Waiver services has been identified, flexibility is provided to convert a portion of the Waiver budget to utilize the State’s portion (based on the Federal Medical Assistance Percentage) for a housing deposit and monthly rent. For example, given a Waiver budget of \$37,000, an individual might retain \$22,000 for support services and use \$5,000 (50 percent of the remaining \$10,000) in State dollars for housing.

Several issues regarding the above have been identified to be resolved before the above can be implemented:

- a. The process to identify a Waiver budget that is equitable for all individuals.

- b. The conversion should not deplete Waiver services to endanger the health and safety of the person.
- c. Request of budget increases merely to utilize the State's portion for housing.

STATUS: This option will be furthered reviewed and pursued. Other considerations include coordinating with the Money Follows the Person project administered and implemented by DHS.

(3) Supported Housing/Bridge Subsidy Pilot Project

This pilot project would be modeled after the DOH, Adult Mental Health Division's Supported Housing/Bridge Subsidy program that has demonstrated success for individuals with mental illness to live independently in housing of their choice. The program provides rentals for persons with mental illness who are stabilized and can live in the community with appropriate supports. The individual selects housing, a rental subsidy is provided, and there is a 24-hour housing support team available for the individual. Since the waiver does not provide payments for room and board, the subsidy could assist people who want to live with others or by themselves in their own apartment/house with in-home supports as needed.

This project could include the individuals who choose to live independently, but require a rental subsidy to help pay for monthly rent costs. Additional funds would be required for implementation of this pilot project.

STATUS: Although this project was highly considered, due to budget constraints and the current economic situation, a proposal to implement the pilot project will be on hold until Hawaii's economy improves.

(4) Coordination with Going Home Plus (Money Follows the Person) Demonstration Project

DHS was awarded a \$10.2 million "Money Follows the Person" Demonstration grant over five years by CMS to bring together the State's resources to support persons who have resided in a health care institution for at least six months but no longer than two years as they transition back to the community.

The Workgroup will coordinate with the project staff and stakeholder group to identify if resources from this demonstration grant called "Hawaii's Going Home Plus Project" can be used to increase residential options for people with DD/MR. According to the proposed transition timelines, people with DD/MR will be transitioned from health care institutional settings into the community beginning in FY 2009. There are 5 individuals with DD/MR targeted to transition in the community during FY 2009, 15 individuals with DD/MR transitioning in FY 2010, and an additional 30 individuals with DD/MR in FY 2011. Going Home Plus will supplement existing services with previously unavailable supports to facilitate successful transitions.

STATUS: DHS has received approval from the CMS for its Operational Protocol on implementation of the demonstration project. Activities are underway to begin transitioning 20 individuals in FY 2008 from nursing facilities and hospitals into the community. The grant's overall goal is to transition 415 individuals in institutions into the community with home and community-based services through FY 2011.

(4) State Immunity from Liability

A legitimate concern was expressed that if Act 303 was interpreted to allow residential options that do not meet current licensing or certification requirements, the State could be held strictly liable for any injuries sustained by residents who choose those options. Consequently, the Workgroup considered pursuing individual waivers of liability and legislative provisions to limit the State's liability. The Workgroup posed the following questions:

- a. Would a waiver of liability allow for placement of persons with DD/MR in unlicensed or uncertified homes without exposure of liability to the State?
- b. Could legislation be introduced that would clearly limit the State's liability when the individual (or the individual's legal representative) chooses a placement that falls within the legal definition of a placement that must be licensed or certified by the State, but is not?

Discussion

Pursuant to Act 303 of the 2006 legislative session, which amended HRS §333F-2(c), supports and services the department shall administer include but shall not be limited to:

(9) Provision of community residential alternatives for persons with developmental disabilities or mental retardation, including ~~[group homes and]~~ homes meeting ICF/MR standards~~;~~, and in a setting of the person's choice if the person with the help of family and friends, if necessary, determines that the person can be sustained with supports, the supports are attached to the person, and adequate consideration and recognition is given to the person's safety and well-being;

A concern raised by the Governor is that DOH's role in selection of these residential alternatives is unclear and there is no guidance in determining how "adequate consideration and recognition" will be given to the person's safety and well-being. The Governor is concerned that "allowing placement in unlicensed or uncertified homes poses a risk for the safety and well-being of persons with developmental disabilities or mental retardation because it is only through licensing or certification requirements that safety standards such as criminal history background checks of the home operator and periodic monitoring or unannounced home visits are maintained." (Gov. Msg. 798, April 26, 2007).

Representatives from the AG's office conducted a preliminary and informal legal analysis of the following questions.

- (1) Would a waiver of liability allow for placement of persons with DD/MR in unlicensed or uncertified homes without exposure of liability to the State?

Hawaii case law provides that waivers of liability will be held void if they violate a statute, are contrary to a substantial public interest, or are gained through inequality of bargaining power.

While the Supreme Court has not addressed the issue of waivers of liability in the context of residential placement for persons with DD/MR, it is likely that if the issue arose, the same criteria would be used. Therefore, the following must be asked:

- a. Would allowing a person with a disability or his/her guardian to agree to waive the State's obligation to provide safe residential alternatives violate a statute, e.g., the mandate of Act 303 to provide community residential alternatives giving adequate consideration and recognition to the person's safety and well-being?
- b. Would allowing a person with a disability or his/her guardian to agree to waive the State's obligation to provide safe residential alternatives be contrary to a substantial public interest, e.g., does the public have a substantial interest in ensuring safe residential alternatives for people who have DD/MR?
- c. Would allowing a person with a disability or his/her guardian to agree to waive the State's obligation to provide safe residential alternatives be an agreement which is gained through inequality of bargaining power, e.g., does the State, which is the entity that is supposed to provide the residential options, have more bargaining power than a person with a disability who needs a place to live or his/her guardian who needs to find a place for him/her to live?

Therefore, even though the Hawaii Supreme Court has not specifically addressed this issue with regard to residential placements for persons with DD/MR, it is likely that a waiver of liability would not legally protect the State from liability in those cases where adequate consideration and recognition has not been given to a person's safety and well-being through carefully developed criteria, such as licensing or certification.

- (2) Could legislation be introduced that would clearly limit the State's liability when the individual (or the individual's legal representative) chooses a placement that falls within the legal definition of a placement that must be licensed or certified by the State, but is not?

It is conceivable that the Legislature could try to enact a law that would make the State immune from liability for a failure to give adequate consideration and recognition to a person's safety and well-being. Language could be something to the effect of:

Immunity and limitation on liability for the provision of community residential alternatives for persons with DD/MR.

When providing community residential alternatives for persons with DD/MR, the State shall not be liable for any claim of injury or death based on a failure to give adequate consideration and recognition to the person's safety and well-being.

After lengthy discussion, such a suggestion was deemed to be untenable by many of the members of the Act 303 Workgroup.

B. Final Report (December 2008)

Expedited Residential Option

Rather than have a new residential option as proposed in A.(1), DDD's Certification Unit will continue to certify AFH according to current administrative rules. However, applications for a person-specific home will be given priority over other applications for certification. A person-specific home is a home and foster caregiver chosen by the applicant and certified only for that specific applicant. With a priority status, the application process will be expedited for review and approval. It is anticipated that the process will take between four to six weeks rather six months.

C. Conclusion

In terms of legislation, members of the Workgroup deemed that it would be acceptable to allow Act 040 to sunset on June 30, 2009. Even with the sunset and removal of the language, the State still has legal obligations to maintain safety standards through its licensing and certification process, and is still required to offer a "client-centered plan, which resulted from the client choices and decision-making that allowed and respected client self-determination." (Section 333F-2(a), HRS)

D. Recommendations

- (1) Allow Act 040, SLH 2006 to sunset on June 30, 2009. As noted in the conclusion above, the State is still required to offer a "client-centered plan, which resulted from the client choices and decision-making that allowed and respected client self-determination." (Section 333F-2(a), HRS)
- (2) DOH, DDD to implement the expedited residential option as described in VI. B. (1).
- (3) DD Council to pursue clarification from DHS that Medicaid eligible individuals living in their own home, family home or apartment, are able to receive Medicaid waiver services.

- (4) DOH, DDD and DD Council to review and address the Summary of Issues and Recommendations from Various Reports (SCR 79 SD1 HD1, December 2005; HCR 40 HD1, December 2006; Act 040/2007, December 2007, and Act 040/2007, December 2008) to the Legislature by the DOH, DDD's Housing Committee.